

Internal Revenue Service

Department of the Treasury
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TY:

LEGEND

Partnership =
Corporation A =
Corporation B =
Year 1 =
Year 2 =
Year 3 =

Dear :

This letter responds to your request for a private letter ruling dated December 15, 2011, submitted by your authorized representatives. The ruling requested is that Partnership may rely on the business records and past procedures of Corporation A and Corporation B to establish that a properly completed and executed Form W-9 has been provided by a U.S. non-exempt recipient payee of an account or instrument transferred by Corporation A or Corporation B to Partnership to determine Partnership's obligations under the backup withholding provisions of section 3406 of the Internal Revenue Code (the "Code"), and will not be required to resolicit Forms W-9 for accounts transferred to Partnership.

FACTS

Both Corporation A and Corporation B are brokers within the meaning of section 6045(c)(1) of the Code. They clear trades for customers and hold securities for customers in street name. Prior to forming Partnership, Corporation A and Corporation B filed information returns reporting gross proceeds on sales as well as interest and dividend payments to customers. In Year 1, pursuant to an Agreement, Corporation A and Corporation B formed Partnership and each transferred to Partnership a number of

their businesses, consisting of wealth management, brokerage, futures and international stock plan businesses (the “Contributed Businesses”). Corporation A owns a majority stake in Partnership.

Pursuant to the Agreement, Corporation A and Corporation B agreed to contribute to Partnership all of the books and records of the Contributed Businesses, including customer records, and to make available information obtained from tax documentation. The tax documentation relating to U.S. customer accounts includes Forms W-9. Accordingly, in Year 2, Corporation A contributed its account platform to Partnership. The relevant books and records and information related to tax documentation for the transferred accounts were transferred to Partnership. Corporation B transferred its books and records for transferred accounts to Partnership, including information related to tax documentation, in Year 3. The information transferred included the name, address, entity classification, and TIN of the customer, whether a valid Form W-9 was on file, and any backup withholding history.

Following the account conversions, Partnership clears trades with respect to the Contributed Businesses’ accounts, and will file information returns with respect to these accounts. The account platform contributed by Corporation A is used by Partnership following conversion.

Corporation A’s original tax documentation (Forms W-9) is stored with an external vendor, and all forms and associated documentary evidence are imaged and stored electronically, and can be retrieved.

Corporation B similarly collected Forms W-9 with respect to its customer accounts,. Corporation B uses the following procedures with respect to obtaining and storing Forms W-9: Physical Forms W-9 embedded in account-opening documents are imaged and maintained by a vendor; the original paper Forms W-9 are destroyed after 30 days. Forms W-9 that are completed, signed, and submitted electronically are imaged and stored electronically. For some domestic stock plans, Forms W-9 are submitted electronically through a voice response unit, and a record of the participant’s responses to questions is stored on magnetic media. For other U.S. stock plans physical Forms W-9 are stored at offices or warehoused. Forms W-9 for domestic and international stock plans are also submitted electronically through a secure website, and the information is stored electronically.

Partnership represents that Corporation A and Corporation B have certified to Partnership that they hold and will make available at the request of Partnership the necessary tax documentation and other supporting records upon which Partnership will rely for its backup withholding obligations.

LAW AND ANALYSIS

Section 3406(a)(1) requires a payor to withhold on a reportable payment at a rate of 28 percent if

- (A) the payee fails to furnish his TIN to the payor in the manner required;
- (B) the Secretary notifies the payor that the TIN furnished by the payee is incorrect;
- (C) there has been a notified payee underreporting described in subsection (c);
- or
- (D) there has been a payee certification failure described in subsection (d).

Section 3406(b) defines “reportable payment” to include, among other payments, reportable interest payments under section 6049(a), reportable dividend payments under section 6042(a), and payments required to be reported under section 6045 (returns of brokers).

Section 3406(d) provides that a payee of interest or dividends will be subject to backup withholding unless he certifies under penalty of perjury that he is not subject to withholding for notified payee underreporting pursuant to section 3406(a)(1)(C).

Section 3406(d)(2) sets forth special rules for interest or dividend payments on readily tradable instruments. The payee is subject to backup withholding for payee certification failure if the payee failed to provide a certificate to the payor and the instrument was acquired directly by the payee from the payor or the instrument is held by the payor as nominee for the payee. If the instrument is acquired through a broker, the payee must provide the required certification to the broker, and broker must notify the payor if the payee is subject to backup withholding under section 3406(a)(1)(A), (B), (C), or (D).

Section 3406(d)(3) provides that sections 3406(a)(1)(D) and 3406(d) do not apply with respect to interest and dividends on pre-1984 accounts and instruments.

Section 3406(h)(4) defines “payor” as the person required to file an information return with respect to a reportable payment in section 3406(b).

Section 3406(h)(5) provides that the term “broker” has the same meaning as “broker” in section 6045(c)(1). However, in the case of any instrument, the term does not include any person who is the payor with respect to the instrument.

Treas. Reg. § 31.3406(d)-1 prescribes the manner required for furnishing a TIN. Treas. Reg. § 31.3406(d)-1(b) provides that with respect to reportable interest or dividend accounts, the manner required depends on whether the account is a pre-1984 or post-1983 account or instrument. With respect to pre-1984 accounts, the payee’s TIN may be furnished orally or in writing, but need not be certified under penalties of perjury.

With respect to post-1983 accounts, the payee must certify under penalties of perjury that the TIN furnished is the payee's correct TIN.

Treas. Reg. § 31.3406(d)-1(b)(2)(ii) provides that when an account is opened, or an instrument acquired, automatically on the maturity or termination of a pre-1983 account or instrument, without the participation of the payee, the new account or instrument may be considered by the payor to be pre-1984. Treas. Reg. § 31.3406(d)-1(b)(2)(iv) provides that if a payor acquires accounts or instruments of another payor, and the pre-1984 or post-1983 status is known, the acquiring payor must treat the account or instrument holders as having the same requirement to furnish a TIN in the manner required to the acquiring payor for information reporting, withholding and related tax provisions as existed with respect to the payor whose accounts or instruments were acquired.

Treas. Reg. § 31.3406(d)-1(c) provides the manner required for furnishing a taxpayer identification number with respect to a brokerage account. With respect to brokerage accounts that are not post-1983 accounts, the payee must furnish the payee's TIN either orally or in writing, but is not required to certify under penalties of perjury that the TIN furnished is correct. With respect to post-1983 accounts, the payee must furnish the payee's TIN and certify under penalties of perjury that the TIN furnished is correct.

Treas. Reg. § 31.3406(d)-2 provides that withholding under section 3406(a)(1)(D) applies to a reportable interest or dividend payment if, and only if, the payee fails to certify to the payor, under penalties of perjury, that the payee is not subject to withholding due to notified payee underreporting under section 3406(a)(1)(C). Withholding under section 3406(a)(1)(D) is generally not applicable with respect to a pre-1984 account or instruments acquired before 1984. Section 3406(d)(3).

Treas. Reg. § 31.3406(d)-4 provides that if a readily tradable instrument is acquired through a post-1983 brokerage account, and the broker is not a broker holding a security for a customer in street name, the broker must obtain the required certifications from the payee, furnish the payee's TIN to the payor and notify the payor with respect to any obligation to backup withhold.

Treas. Reg. § 31.3406(h)-3 provides that the Form W-9 is the form to be used for a U.S. person to certify, under penalties of perjury, that his TIN is correct and that he is not subject to withholding due to notified payee underreporting. Substitute forms are permitted.

Treas. Reg. § 31.3406(h)-3(g) provides that with respect to post-1983 accounts and instruments, a payor or broker who receives a Form W-9 must retain the form in its records for 3 years from the date the account is opened or the instrument is purchased. The form may be retained on microfilm or microfiche.

Treas. Reg. § 301.6724-1(g) provides a due diligence safe harbor which allows filers to establish reasonable cause with respect to information reporting failures. Treas. Reg. § 301.6724-1(g)(2) provides special rules relating to failures to provide a correct TIN on an information return or payee statement, and sets forth questions and answers. Q&A 10 provides that an acquiring payor may rely upon the business records and past procedures of a merged payor or a payor whose accounts or instruments were acquired in order to establish due diligence to avoid the penalty under section 6721(a) with respect to information returns that have been or will be filed.

In this case, Partnership has acquired customer accounts from Corporation A and Corporation B. Prior to formation of Partnership, Corporation A and Corporation B purchased and held instruments for their customers in street name, and filed information returns with respect to interest and dividends from those instruments and with respect to brokerage transactions within the customers' accounts. As such, Corporation A and Corporation B were payors with respect to their customers' accounts, not brokers for purposes of the special rules set forth in Section 3406(d)(2) and Treas. Reg. § 31.3406(d)-4.

Corporation A and Corporation B obtained TINs and certifications directly from payees. Partnership is now the payor with respect to the transferred accounts. Partnership will be purchasing instruments in street name for customers, clearing trades and making payments with respect to customer accounts, and filing the required information returns. The account owners of the accounts remain the same after the acquisition, and did not participate in the transfer of the accounts.

Pursuant to § 31.3406(d)-1(b)(2)(ii) and (iv), Partnership stands in the shoes of Corporation A and Corporation B, the predecessor payors, with respect to the accounts acquired. See, for example, Rev. Proc. 99-50, 1999-2 C.B. 757. Forms W-9 are only required with respect to the same accounts for which Corporation A and Corporation B were required to obtain them. Further, Partnership may rely on the books and records and past procedures of Corporation A and Corporation B to establish that Forms W-9 were obtained as required, and maintained as required, with respect to the acquired accounts. Treas. Reg. § 301.6724-1(g)(2), Q&A 10. Therefore, Partnership is not required to obtain new Forms W-9 from the accountholders if a Form W-9 was obtained by Corporation A or Corporation B. In addition, pre-1984 accounts will retain their status and no Form W-9 is required with respect to those accounts.

Therefore, Partnership will not be required to obtain new Forms W-9 with respect to transferred accounts. Partnership will have the same obligation to produce Forms W-9 for customer accounts, or evidence of having obtained Forms W-9, as had Corporation A and Corporation B, and may rely on the records maintained by Corporation A and Corporation B in meeting that obligation. Corporation A and Corporation B have certified that they will make Forms W-9, or evidence of having obtained Forms W-9, available to Partnership to meet its obligations under section 3406.

Partnership will be required to obtain new Forms W-9 only with respect to post-1983 accounts for which records indicate that no Form W-9 was obtained by Corporation A or Corporation B, or for which the records indicate that a Form W-9 was obtained but not retained for the required 3 years. Partnership may also be required to resolicit new Forms W-9 with respect to corporate customers who previously claimed exemption from information reporting and backup withholding on broker payments,

Pursuant to section 3406(e)(4) and Treas. Reg. § 31.3406(e)-1(e), Partnership will be required to backup withhold on payments to accounts which lack the required payee certifications until Forms W-9 are received from the payees.

In addition, Partnership must backup withhold on payments to accounts if, under section 3406(a)(1)(A), the payee TIN is missing or obviously incorrect; under section 3406(a)(1)(B) if the Internal Revenue Service sends a notice that the TIN furnished by the payee is incorrect; or under section 3406(a)(1)(C) if there is a notified payee underreporting of interest and dividends.

CONCLUSION

For purposes of determining Partnership's backup withholding obligations under section 3406 of the Code, Partnership may rely on the business records and past procedures of Corporation A and Corporation B to establish that Forms W-9 were obtained, as required, from payees of transferred accounts. Partnership is not required to obtain new certifications from payees where the transferred records show that properly completed Forms W-9 were obtained and maintained as required, and Partnership is able to retrieve the Forms W-9 from Corporation A and Corporation B for the period they must be maintained. Partnership is required to obtain new Forms W-9 only if no Form W-9 was obtained or if it needs to confirm the exempt status of a corporate customer.

Granting the requested rulings is not a determination that the documentation gathered by Partnership, Corporation A, and Corporation B with respect to any particular account holder of the Contributed Businesses satisfies the documentation requirements of section 3406 with respect to that account holder and does not preclude the Service from auditing Partnership's, Corporation A's, and Corporation B's documentation.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination. This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Ashton P. Trice
Chief, Branch 2
(Procedure and Administration)

cc: